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Utah Supreme Court

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# In the Supreme Court of the State of Utah

STATE OF UTAH by and through its  
ATTORNEY GENERAL,

Plaintiff

vs.

THE ALTA CLUB, a nonprofit corporation of the State of Utah; AMBASSADOR ATHLETIC CLUB, a nonprofit corporation of the State of Utah; THE AVIATION CLUB OF UTAH, a nonprofit corporation of the State of Utah; THE COUNTRY CLUB, a nonprofit corporation of the State of Utah; SALT LAKE LODGE NO. 259, LOYAL ORDER OF MOOSE OF THE WORLD, a nonprofit corporation of the State of Utah; THE UNIVERSITY CLUB, a nonprofit corporation of the State of Utah; SALT LAKE POST NO. 2, THE AMERICAN LEGION, DEPARTMENT OF UTAH, a nonprofit corporation chartered by act of Congress and qualified to do business in the State of Utah; FORT DOUGLAS CLUB, a nonprofit corporation of the State of Utah; SALT LAKE LODGE NO. 85, BENEVOLENT AND PROTECTIVE ORDER OF ELKS, a nonprofit corporation of the State of Utah; THE DEPARTMENT OF UTAH, VETERANS OF FOREIGN WARS OF THE UNITED STATES, a nonprofit corporation of the State of Utah; and SAHARA CLUB, INC., a nonprofit corporation of the State of Utah,

Defendants

Case No. 7555

## APPELLANT'S BRIEF

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**FILED**

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STATE OF UTAH by and through its  
ATTORNEY GENERAL,

**Plaintiff**

vs.

THE ALTA CLUB, a nonprofit corporation of the State of Utah; AMBASSADOR ATHLETIC CLUB, a nonprofit corporation of the State of Utah; THE AVIATION CLUB OF UTAH, a nonprofit corporation of the State of Utah; THE COUNTRY CLUB, a nonprofit corporation of the State of Utah; SALT LAKE LODGE NO. 259, LOYAL ORDER OF MOOSE OF THE WORLD, a nonprofit corporation of the State of Utah; THE UNIVERSITY CLUB, a nonprofit corporation of the State of Utah; SALT LAKE POST NO. 2, THE AMERICAN LEGION, DEPARTMENT OF UTAH, a nonprofit corporation chartered by act of Congress and qualified to do business in the State of Utah; FORT DOUGLAS CLUB, a nonprofit corporation of the State of Utah; SALT LAKE LODGE NO. 85, BENEVOLENT AND PROTECTIVE ORDER OF ELKS, a nonprofit corporation of the State of Utah; THE DEPARTMENT OF UTAH, VETERANS OF FOREIGN WARS OF THE UNITED STATES, a nonprofit corporation of the State of Utah; and SAHARA CLUB, INC., a nonprofit corporation of the State of Utah,

**Defendants**

Case No. 7555

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## APPELLANT'S BRIEF

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## STATEMENT OF FACTS

This is an appeal from a judgment of the District Court of Salt Lake County declaring the operation and effect of sections of the Utah Liquor Control Act, Title 46, Utah Code Annotated 1943.

Action was commenced by the Attorney General for the State of Utah to determine whether certain conduct of the defendants was in violation of Sections 46-0-157a, 46-0-168 and 46-0-237 Utah Code Annotated 1943. Because appellant is in agreement with the ruling of the District Court as to Section 46-0-157a, no issue is being taken in that regard in this appeal, and plaintiff likewise does not contend that the operations of the defendants are in contravention of Section 46-0-168. It is the construction of Section 46-0-237 by the trial court which is the basis of this appeal.

There is no substantial fact issue between plaintiff and defendants, the case having been submitted upon stipulations between the parties.

The facts as stipulated, and as found by the trial court, show the following:

The defendants are 11 nonprofit corporations of the State of Utah, and in their corporate capacity occupy buildings or portions of buildings. All of these corporations are *bona fide* clubs and the State does not contend that any of them was organized for the purpose of evading the Utah Liquor Control Act.

Notwithstanding the high purposes of the clubs, and the honorable motives of their members, each of the defendants maintains what is known as a liquor "locker system" whereby lockers of varying sizes are let to members of the clubs (Tr. 109, 114, 120, 122, 123, 129, 133, 137, 141, 142d). The "lessees" may, if they desire, store in these lockers alcoholic beverages purchased from the Utah Liquor Control Commission. Some of the defendants allow only the holder of the locker to have a key, others retain a master key by which officials or certain employees may open any locker.

In addition to the lockers mentioned, each defendant maintains a room or rooms—which may or may not be separate from the locker room—in which members (and in the case of some of the clubs, guests) may convert the liquor and other ingredients into a finished mixed drink. To this end the defendant clubs supply ice, glasses and various types of mixers—either for cash or a signature on a slip. The clubs will, however, furnish ice, mixers and soft drinks to liquorless patrons without a price differential. In some of the clubs only the ingredients are supplied; in others, members may by paying a small service charge have an attendant do the mixing. The plaintiff does not, for the purposes of this appeal, regard these differences in practice as being material.

As an aid to the construction of the Liquor Control Act the State introduced a certified copy of the enrolled House Bill 41 of the 1935 State Legislature (Ex. "A"). The defendants put in evidence some opinions issued by the office of Attorney General of Utah, and data regarding the number of beer licenses issued in Salt Lake City. In open court it was stipu-

lated that the locker system has been in existence in Utah in some form or other "since before the repeal of prohibition" (R. 166).

## STATEMENT OF POINTS

1. The court improperly ruled that the operations and methods of the defendants are not contrary to the provisions of 46-0-237 Utah Code Annotated 1943.
  - (a) Section 46-0-237 Utah Code Annotated 1943, by its terms makes an offense of maintaining an establishment where persons are permitted to resort for the drinking of alcoholic beverages.
  - (b) The plain meaning of a statute may not be varied by contemporaneous construction.

## ARGUMENT

### I.

THE COURT IMPROPERLY RULED THAT THE OPERATIONS AND METHODS OF THE DEFENDANTS ARE NOT CONTRARY TO THE PROVISIONS OF 46-0-237 UTAH CODE ANNOTATED 1943.

(A) SECTION 46-0-237 UTAH CODE ANNOTATED 1943 BY ITS TERMS MAKES AN OFFENSE OF MAINTAINING AN ESTABLISHMENT WHERE PERSONS ARE PERMITTED TO RESORT FOR THE DRINKING OF ALCOHOLIC BEVERAGES.



It is the contention of the plaintiff that Section 46-0-237 Utah Code Annotated 1943 shows a legislative intent to make a common nuisance of any establishment where a number of persons are frequently permitted to gather and consume alcoholic beverages, whether or not these persons violate other provisions of the Liquor Control Act. The section in question provides:

“Any room, house, building, boat, vehicle, structure or place where alcoholic beverages are manufactured, sold, kept, bartered, stored or given away, or used in violation of this act, *or where persons resort for the drinking of alcoholic beverages*, and all alcoholic beverages, packages, equipment or other property kept or used in maintaining the same, are hereby declared to be common nuisances; \* \* \* ” (Italics added).

It is also provided that persons who maintain such common nuisances shall be guilty of a misdemeanor. Under 46-0-238 Utah Code Annotated 1943, common nuisances of the preceding section may be abated by court proceedings.

It is not disputed that the defendants maintain rooms or buildings wherein persons are permitted to meet and drink alcoholic beverages. But it is contended, on the other hand, that this practice does not amount to “resorting” as that term is used in the statute, and that the statute was not meant to prohibit drinking in “private clubs.”

A glance at the history of the legislation will give us an idea of what the legislature had in mind when it adopted the present wording. The Liquor Control Act originally appeared as Chapter 43, Laws of Utah 1935. At that time 46-0-237 was Section 195. It then read:

“ \* \* \* or where persons resort for the drinking of alcoholic beverages *contrary to the provisions of this act*, \* \* \* are hereby declared to be common nuisances.”  
(Italics added.)

As the section then stood it was arguable, if not clear, that under its terms something more than a mere “resorting” was needed to make an establishment a common nuisance. The resorting would have to have been in violation of some other positive provision of law.

The act was amended in some details in 1937. At that time the legislature deleted the words “contrary to the provisions of this act,” and left the section in the form in which it now appears in the code. If the legislature in 1937 had been seeking a way of making a substantive offense of the mere maintaining of a place where persons resort for the drinking of alcoholic beverages, it is difficult to comprehend a simpler way of doing this than the method adopted.

Certainly some effect must be given to the change in wording. It is a well-established principle of statutory construction that where the legislature changes the wording of a statute it thereby intends to change the law.

The general rule relating to the effect of amendment of an existing statute is found in Sutherland on Statutory Construction (3rd Ed.) Sec. 1930:

“Because it is defined as an act that changes an existing statute, the courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the

original act is presumed to indicate a change in legal rights."

In *In re Segregation of School District No. 58 from Rural High School District No. 1*, 34 Idaho 222, 200 Pac. 138, the Supreme Court of Idaho says:

"An intentional omission of words by a legislature should be given effect (citing cases). Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred. *Springfield Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477; *Duff v. Karr*, 91 Mo. App. 16. However, every change of phraseology does not indicate a change of substance and intent. \* \* \* A change of language has more significance where the purpose is to amend a single statute than in a general revision or codification."

The amendment in the instant case did not come in during a general revision of the code. See also *Yarbrough v. Collins*, 91 Tex. 406, 42 S. W. 1052; *Rieger v. Harrington*, 102 Or. 603, 613; 203 Pac. 576, 580; *Pierce v. Riley*, 21 Cal. App. (2d) 513; 70 Pac. (2d) 206.

It is not unreasonable to seek to prevent such resorting. As an aid to law enforcement the legislature may prohibit many things which are not in themselves bad. During prohibition, when the sale of intoxicating beverages was unlawful, many states also prohibited the sale of certain similar non-intoxicants for the reason that such sales might enable persons to evade the provisions relating to intoxicants. In a situation where the state is given the power to make all sales of intoxicating liquors it is legitimate—and possibly wise—for the legislature to

prevent the maintaining of establishments which could become a shield for the sale of intoxicating liquors contrary to law.

The history of intoxicating liquors is a history of legislative attempts to devise the most effective means of control. There has been legislation on the subject in England since the early days of the common law, and in America since colonial days. See 7 Law and Contemporary Problems 544. It is not startling, therefore, to assume that the legislature of Utah, in seeking a means of liquor law enforcement, looked to the past and to prior statutes. Our provision relating to "resorting" is not a child of the imagination of the Utah legislature. The cases show that substantially similar provisions have been used by various states.

In *State v. Owens et al.*, 9 Kan. App. 595, 58 Pac. 240, the defendants had been convicted of keeping a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage. On appeal the defendants contended, *inter alia*, that the act should be interpreted to operate upon places where persons resort "in violation of law." On this question the Kansas court said:

"But the offense charged is not the possession of the liquors, nor the giving away of liquors, but the keeping of a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage. The keeping of such a place constitutes the gravamen of the offense, and in this connection we may remark that the giving by a person of a drink of intoxicating liquor to a friend upon such person's own premises would not, as is contended by appellant's counsel, constitute a violation of the nuisance section of the prohibitory law, even though the clause under

consideration be construed in its literal sense. The word 'resort' means something of a common occurrence,—the habitual frequenting of a place by more than one person. \* \* \*

That part of the prohibitory liquor law which defines 'common nuisances' is as follows: 'All places where intoxicating liquors are manufactured, sold, bartered or given away in violation of any of the provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances.'

\* \* \* To construe the second clause as appellant's counsel would have us would be, in effect, to hold it a mere repetition of the first and third clauses. As the legislature omitted the qualifying words, 'in violation of the provisions of this act,' from the second clause, we are led to the conclusion that it was the intention of the legislature to make the 'keeping' of a place to which persons habitually resort for the purpose of drinking liquor as a beverage a crime, whether any other provision of the prohibitory law was violated at such place or not."

In the above case the court was dealing with an original, unamended statute. Where the statute has been amended, as in the present case, and the words "contrary to the provisions of this act" eliminated by subsequent action of the legislature, the argument that there must be an additional violation loses all force.

In *Shelton v. State*, 191 Ind. 228, 132 N.W. 594, the court was called upon to construe a section of the Indiana law which made a place a common nuisance if persons were

permitted to resort there for the purpose of drinking intoxicating liquors. On affirming the conviction, it was said:

“Proof that she maintained a place where persons were permitted to resort for the purpose of drinking intoxicating liquor as a beverage was sufficient to sustain a verdict of guilty.”

In *State v. Poggmeyer*, 91 Kan. 633, 138 Pac. 593, a conviction for maintaining a common nuisance was sustained where the evidence showed that meetings had been held in a rented room every two weeks for thirteen weeks and that beer had been served at four of the meetings.

In *State v. Topeka Club*, 82 Kan. 756, 109 Pac. 183, 29 L.R.A. (N.S.) 722, the Kansas Supreme Court, in discussing the “resorting” and related provisions of Kansas law, said:

“The main and principal object of this statute does not seem to be merely to prevent people from drinking their own liquor as a beverage, but its real purpose is to prevent the organization of associations for the purpose of maintaining a place where a large number of people are permitted to keep intoxicating liquor and use it as a beverage.”

It is admitted that the above cases are not of recent vintage. They were in the reports at the time the Utah Liquor Control Act was originally passed. They were still in the reports when the act was amended in 1937. We must assume that when the legislature adopted the present statute it meant also to adopt interpretations of the language used.

In *In re Raleigh's Estate*, 48 Utah 128, 138, 158 Pac. 705, this court recognized such a rule of construction when it said:

“In view that the decisions of Iowa were in effect before that section was adopted by the code commission of this state in 1898, we must assume that the construction placed upon it by the Supreme Court of Iowa was likewise adopted.”

The rule thus announced has been generally followed in this state. See *In re Cowan's Estate*, 98 Utah 393, 396, 99 Pac. (2d) 605; *Norville v. State Tax Commission*, 98 Utah 170, 177; 97 Pac. (2d) 937, 126 A.L.R. 1318; *Fuller-Toponce Truck Co. v. Public Service Commission*, 99 Utah 28, 35; 96 Pac. (2d) 722. When the present “resorting” provision was adopted in Utah the meaning of “resorting” under similar acts was firmly established.

The construction contended for by appellant would not require a holding that all licensed beer vendors are also guilty of maintaining common nuisances, even though beer does come within the definition of “alcoholic beverage” under the Utah act. The reason is pointed out in *Sopher v. State*, 169 Ind. 177, 81 N.E. 913, 14 Ann. Cas. 27, 14 L.R.A. (N.S.) 172. This case points out that while such sales might be nuisances under a general section, the fact that they are licensed by authority of the state removes them from the general operation of the prohibitory section. In holding that evidence of a license should have been received in this prosecution for maintaining a nuisance, the Indiana court said:

“A public nuisance, strictly speaking, arises out of the violation of public rights, and as a general rule results in no more special injury to one person than to another. Such nuisance always arises from unlawful acts. Consequently that which is lawful cannot be regarded in a legal sense as a public nuisance.”



Therefore, if the Legislature, by a statute which it is competent for that body to pass, authorizes an act or acts to be done, which in the absence of such a statute, would otherwise constitute a public nuisance, such act or acts, are thereby made lawful, and cannot be considered or regarded in a legal sense as a nuisance so far as the public is concerned, unless the Legislature in enacting the statute has exceeded its power."

Defendants' pleadings and the findings of fact make much of the circumstance (which we acknowledge) that the clubs are of an outstanding character and composed of high-class members. A similar contention was made in *State v. Topeka Club*, 82 Kan. 756, 109 Pac. 183, 29 L.R.A. (N.S.) 722. The court said:

"The legislature doubtless believed that, if persons were permitted to maintain club rooms in which liquor was kept for use as a beverage, the practice, however innocent in itself, when carried on in good faith, might easily be converted into a medium for the sale of liquor under the form of maintaining a club, and to prevent this practice forbade a course of conduct where sales, if made, would be difficult to detect and punish.

\* \* \*

We conclude that the chief purpose of this section was to prevent a practice which might encourage and perhaps lead to sales of intoxicating liquors at such places. It is therefore fairly within the scope of the title to the act, and is not unconstitutional. It may be said of the club that on account of the careful manner in which it has been managed no serious objections have been urged against it, but under the rules and regulations which it has adopted, an association of men inclined to violate the law and trespass upon the peace and good order of society might become a very unsatisfactory and objectionable institution."



Commenting upon the fact that only 15 of the 140 members actually used the locker system of the club, the court said, "this \* \* \* is due to the character of the membership rather than to the character of the organization."

And in *Harvey v. Missouri Athletic Club*, 261 Mo. 576, 170 S.W. 904, L.R.A. 1915 C 876, 5 A.L.R. 1192, the court commented upon the dispensing of liquors as being "incidental" to the main purposes of social clubs incorporated under a statute providing for the formation of benevolent, religious, scientific and educational associations, by saying:

"to render respondents' contention applicable it must be further assumed that the sale of liquors, concretely stated, is related to either benevolence, religion, science, or education, or that it is incident to one of such objects,—a rather unusual relationship, to say the least."

While the present case does not involve the "sale" of liquors, the principle involved is the same.

The court below admitted an incapacity to draw the line between what conduct would amount to resorting and what would not. It placed upon the appellant the burden of distinguishing between those cases where the statute would in every instance apply and those in which it would not. Inasmuch as the appellant was not able to do this to the satisfaction of the trial court, that court ruled, in effect, that there are no situations in which the statute applies. We submit that it is not necessary to the decision of this case to delineate with fine precision the results of all possible cases where the question might again arise. The only point to be determined in this action is whether the defendant clubs are violating the section

in issue. It was not necessary for the trial court, nor for this court, to determine whether the prohibitory words of 46-0-237 would apply to homes or to the use of sacramental wines in churches. We have before us a case where the statute clearly applies. The trial court used the "backward approach" to statutory construction and found that inasmuch as there might be some cases in which the statute would be of doubtful meaning it is doubtful as applied to all situations. The method adopted below was to use statutory construction in order to *create*, rather than to *solve*, an ambiguity. The court below was obligated only to rule whether the present defendants were within or without the statute; it was not required to draw a sharp line which would resolve, in advance, all possible future litigation which might arise under 46-0-237.

(B) THE PLAIN MEANING OF A STATUTE MAY NOT BE VARIED BY CONTEMPORANEOUS CONSTRUCTION.

The defendants have relied upon the doctrine of contemporaneous construction because of the fact that they have operated in their present manner for a number of years. The oral stipulation, as pointed out in the statement of facts, was to the effect that the locker system has been used in Utah since before the repeal of prohibition. It is plaintiff's belief that under such circumstances it cannot be contended that the users of the locker system had much regard for the question of whether or not it was legal. And it is just as logical to infer, from the facts, that enforcement officers have been lax in their duties as it is to infer that the legislature intended that the locker system should be lawful.

The most serious objection to which the doctrine of contemporaneous construction is open in the instant case is that this doctrine of statutory construction may not be used to vary the plain meaning of the statute. *Bridge and Highway Department v. Felt*, 214 Cal. 308, 5 Pac. (2d) 585. It should always be rejected where it is unreasonable or clearly erroneous. *Burnet v. Chicago Portrait Company*, 285 U. S. 1, 16, 76 L.Ed. 587, 52 S. Ct. 275. In the case of *State ex rel. University of Minnesota vs. Chase*, 175 Minn. 259; 220 N.W. 951, the court used the following language in meeting the argument of contemporaneous construction:

“There is thus abundant ammunition for the argument of practical construction. But the case furnishes it no target. We cannot even adopt it as a buttress for a conclusion already reached, as is sometimes done. *State ex rel. Hilton v. Sword*, 157 Minn. 263, 265, 196 N.W. 467. A practical construction of anything written—constitution, statute, or contract—is but an aid to interpretation, not to be resorted to unless such an aid is required. In a real but broad sense, it is true that ‘words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. \* \* \* All the circumstances must be considered which go to make clear the sense of the words.’ 5 Wigmore, Ev. (2 Ed.) sec. 2470(3). But when that sense is made or becomes plain, the process of interpretation ends. In construing a constitutional provision or any writing, first resort is to letter and spirit. That implies application of writing to subject matter. If without going farther the meaning is plain, interpretation is at an end. Resort cannot then be had

to the extraneous to obscure what is already clear, and so start again the process of construction and excuse resort to further extraneous aids. The extraneous or subsequent cannot be resorted to as a means of refuting what is inescapable from the instrument itself in application to its subject. It is not then permissible to adopt any different practical construction of a constitution, however long continued or well established, or however distinguished its authorship. Hence, every authoritative statement of the doctrine of practical construction makes it applicable only in a case of doubtful meaning. See for example, *Springer v. Philippine Islands*, .... U. S. ...., 48 S. Ct. 480, 72 L.ed. 522, 527. The doctrine is allowed its 'full legitimate force \* \* \* to solve in its own favor the doubts which arise on reading the instrument to be construed.' 1 Cooley, *Const. Lim.* (8 ed.) 151. It may illustrate or confirm, explain doubt or expound obscurity, but 'it can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries.' 1 Story, *Const.* (5 ed.) sec. 407.

Where the controlling words have a definite meaning and involve no absurdity or self-contradiction, 'then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. \* \* \* Neither courts nor legislatures have the right to add or to take away from that meaning. \* \* \* It must be very plain, nay, absolutely certain, that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty, to depart from the plain reading of a constitutional provision.' *State ex rel, Childs v. Sutton*, 63 Minn. 147, 150, 65 N.W. 262, 30 L.R.A. 630, 56 A.S.R. 459, quoting from *Newell v. People*, 7 N.Y.

9, 97. Compare *State ex rel. Putnam v. Holm*, 172 Minn. 162, 215 N.W. 200. Were the courts, simply because of its extended duration, obliged to follow an erroneous practical construction of a plain provision of it, a constitution could be amended without consulting the people. Nothing is farther from the basic theory of our government. 'When the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged.' The delay in presenting the question is no excuse for not giving it full consideration and determining it in accordance with the true meaning of the constitution. *Fairbank v. U. S.* 181 U. S. 283, 311, 21 S. Ct. 648, 45 L.ed. 862.

We find it unnecessary to discuss the argument based upon the debates in the state constitutional convention. They show nothing opposed to our conclusions. They are but another aid to be resorted to only in case of doubt. To us, the language of art. 8, sec. 4, of the constitution of Minnesota admits of no doubt."

And even if the statute before us is open to interpretation, the doctrine of administrative or contemporaneous construction should not change the result. In 2 *Sutherland on Statutory Construction* (3rd ed.) Sec. 5104, it is said:

"The conclusiveness of a contemporaneous and practical construction will depend upon a number of additional elements that give efficacy to the rule. In general, these elements are: (1) that the interpretation originated from a reliable source; (2) that the interpretation has continued for a long period of time and received wide acceptance, and (3) that the interpretation was made at or near the time of the enactment of the statute."

We submit that not one of the elements listed above is present in the instant case. There is no showing that the construction has been "contemporaneous, long, uniform and practical." See *People ex rel. DeBoer v. Geary*, 323 Ill. App. 32, 54 N.E. (2d) 840.

In any event, the court must weigh contemporaneous construction against other extrinsic aids in the interpretation of the statute. *Board v. Borgen*, 192 Minn. 367, 256 N. W. 894; *Jordt v. Board*, 35 Cal. App. (2d) 591, 96 Pac. (2d) 809. We have shown that other maxims of statutory construction lead to the conclusion that defendants' conduct is unlawful under the provisions of 46-0-237 Utah Code Annotated 1943.

For the doctrine to apply it should appear that the construction contended for has been called to the attention of the Legislature, and informal interpretations by administrative departments will be given little weight. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 78 L. ed. 1361, 54 S. Ct. 806.

That enforcement officers have been derelict in enforcing the provisions of a particular statute will not later estop the state from enforcing the act, and may be doubtful evidence of legislative intent. *Ada County v. Boise Commercial Club*, 20 Idaho 421, 118 Pac. 1086; *Commission ex rel. Huntsman v. Kentucky Distilleries and Warehouse Company*, 143 Ky. 314, 136 S.W. 1032; *Louisville v. State Board of Education*, 154 Ky. 316, 157 S.W. 379. Even where non-action is taken to indicate a contemporaneous construction it should appear that the non-action is a result of thoughtful interpretation

rather than accident. 2 Sutherland on Statutory Construction (3rd ed.) 520.

The above cases indicate that the court erred in finding the legislature did not intend to prohibit the type of conduct now being engaged in by the defendants.

## CONCLUSIONS

The Utah legislature adopted, with minor variations, a type of common nuisance section which had appeared often in statutes of other states. The interpretation placed upon such sections prior to its adoption in Utah was such as would make unlawful the operations and methods of the defendants. It is presumed that the legislature meant to adopt the section as interpreted. And this is even clearer when it is noted that the section was materially amended in 1937 to conform to earlier acts.

The meaning of the statute thus being clear, the doctrine of contemporaneous construction has no application. But even if this doctrine may be used, it is under the circumstances such a weak indication of legislative intent that the interpretation of the statute under other principles may not be altered.

For the above reasons we believe the judgment of the trial court should be reversed and this court should enter a declaratory judgment to the effect that the locker system as practiced by these defendants is within the prohibition of Section 46-0-237 Utah Code Annotated 1943.



Because all issues are issues of law there is no necessity of remitting the case to the trial court for further action.

Respectfully submitted,

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